(LORD GARDENSTON Reporter.)

INFORMATION

FOR

ALEXANDER KEVAN, Tenant in Little-Carse, Defender,

AGAINST

CHARLES WARNER-DUNBAR, of Machriemore, Pursuer.

WILLIAM DUNBAR merchant in Antigua, finding his affairs in Scotland disordered, and his estate involved in debt, resolved, as the most proper method of restoring them, to send over his son, the pursuer, with ample powers of administration. He was tempted to this measure by the bad success which his former factories had met with. He had granted several discrepant factories, which either had turned out informal, or had met with a refusal from the gentlemen named in them. Doubtful if there was any factor upon his estate of Machriemore, whose deeds could be considered

Sept. 21. 1764. dered as legally valid, he made out a full power of attorney, in favours of the purſuer, whereby he empowered "Charles "Warner-Dunbar, his ſon, for him, and in his name, to ſign, "ſeal, and deliver any mortgage, *leaſe*, aſſignments, con- "veyance, or aſſurance, to any perſon, or perſons, that ſhall "agree to *leaſe*, or purchaſe, or take mortgage or other "conveyance of the ſaid eſtate of Machriemore, lead mines "therein, or wood growing thereon, or any of them, or a- "ny part of them, as the ſaid Charles Dunbar, in his diſcre- "tion, ſhall think fit, for the ſufficient *leaſing*, mortgaging, "aſſigning, conveying, and aſſuring of the premiſes, to the "perſon, or perſons, who ſhall contract for a leaſe, mortgage, "purchaſe, or other conveyance of the ſame, or any part "thereof, &c."

With this power of attorney, the purſuer arrived in Scotland in November 1764. It was regiſtrated in the regiſter of the ſtewartry of Kirkcudbright, 14th February 1765. It is neceſſary to obſerve here, that the defender, as well as the purſuer, are obliged to have recourſe to the proof led in a former proceſs before this court, *viz.* a competition of leaſes of the mines of Machriemore, determined in the 1769. This letter of attorney, your Lordſhips will obſerve, contained the fulleſt powers, which it is poſſible for one man to veſt in another. He was empowered to mortgage, or wadſet *ad libitum*; which powers, though perhaps inconſiſtent with the ſituation of the Machriemore eſtate at that time, plainly point out the great confidence which Mr Dunbar put in his ſon's abilities. The purſuer, immediately after his arrival, took upon himſelf the ſole adminiſtration of his father's eſtate. He lett leaſes, brought down perſons from England to examine the mines upon his eſtate, and advertiſed a ſale of his woods. Theſe acts of adminiſtration were always directed by the advice of Mr Agnew of Scheuchan, a particular friend of the family, and particularly acquainted with their affairs. The defender, upon the faith of the purſuer's power of attorney, and the report of the country,

Thomas Paton againſt Caruthers.

country, of this date, entered into a contract of leaſe with him of the lands of Park, M'Lurg, and pertinents, to commence at the ſubſequent Whitſunday, and to endure for the term of 25 years; the rent L. 45 ſterling; and he likewiſe took a leaſe from him, of the lands of Meikle-Carſe, to commence at Whitſunday 1769, and to endure for 21 years; the rent L. 60. Both theſe leaſes ſecluded aſſignees and ſub-tenants, and proceeded upon the above power of attorney. The defender took poſſeſſion in conſequence of theſe leaſes, and continued it without challenge till this proceſs was raiſed in June 1769. Feb. 26. 1769.

As ſeveral tenants upon the purſuer's eſtate are preciſely in the ſame predicament with the defender, and whoſe leaſes muſt ſtand or fall by the judgement to be pronounced by your Lordſhips in this cauſe; he therefore looks upon himſelf as particularly unfortunate, in being ſingled out to bear alone all the expences of this litigation.

The eſtate of Machriemore, in the ſtewartry of Kirkcudbright, had been laid under a ſtrict entail, by Patrick Dunbar, in December 1749. William Dunbar, the purſuer's father, had allowed adjudications to paſs againſt the eſtate, contrary to the prohibitions contained in the tailzie. A declarator of irritancy, for theſe reaſons, was raiſed, in which the Lord Juſtice Clerk, of this date, *decerned*. The decreet has been ſince extracted, adjudication in implement led, and a charter expede upon it, in favours of the purſuer. Being now fully veſted in the eſtate, he means to reduce the deeds of adminiſtration done by himſelf, *in factorio nomine*. This action came of courſe, before the Lord Gardenſton, who, of this date, "ordained the defender to give in anſwers to a condeſcend- "ence of the ſpecial reaſons of reduction, exhibited by the "purſuer." The former powers of attorney, founded upon by the purſuer, were not produced; but, inſtead of them, a printed ſtate of the proceſs, relative to the Machriemore mines, which contained full copies of theſe powers. The defender complained of this, becauſe it put it out of his power to prove, ſo eaſily Aug. 5. 1768. July 26. 1770.

ly as he might have done, had the factories been in process, that they were either informal of themselves, or never accepted by the gentlemen named in them. The defender produced extracts of the foresaid two leases, and the pursuer the factory to himself, dated the said 1st September 1764, attested according to the English form, before the Lord Mayor of London, upon the 24th October following. The production being thus satisfied, and answers given in to the pursuer's condescendence,

Nov. 22. 1770. the Lord Ordinary pronounced this interlocutor: "Having "considered the condescendence and answers, makes great a- "vizandum therewith, and ordains informations to be "given in." The pursuer having withdrawn his titles from the process, the defender not chusing to prepare his information, till they should be produced, the Lord Ordinary, on the 20th December 1770, at a calling, 'Ordained the 'procurator for the pursuer to re-produce his titles; and 'both parties to lodge their informations in the clerk's hands, 'betwixt and the 5th day of January next, with certifica- 'tion.' In obedience thereto, this is humbly offered upon the part of the defender.

From what has been already said, your Lordships will fully comprehend the nature of this action. The pursuer means to reduce leases granted upon an alledged mistake, of which he confesses himself to have been the sole cause.——It is not pretended that any arts were used to deceive him, or to inveigle him into a lease. Now informed, that some small addition of rent may be squeezed out of the tenants, provided their leases can be set aside, his eyes are opened, and he has at length discovered, that, when acting as factor upon his father's estate, he exceeded his powers. The nature of this action is very delicate. It is not every man who could have had firmness enough of mind to have brought it; for, laying aside law altogether, a man's honour is bound to make good his engagement, in whatever shape it is given, providing it be neither extorted from him by force, or inveigled from him

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by artifice. A pretty ſingular argument is alledged for the purſuer, that a poſterior factory arrived, by which his powers were recalled, dated 21ſt September 1764.—In this factory the purſuer is named jointly with ſome other gentlemen. But this factory, like the reſt, was not produced in proceſs; ſo that the defender has acceſs to know very little about it: This, however, he knows, that it never was accepted, nor acted under. From the purſuer's arrival in Scotland, the factors formerly named, conſidering themſelves as ſuperſeded in office, all the acts of adminiſtration were performed by himſelf alone. Perhaps they thought that the moſt preferable way of managing was to allow all acts of adminiſtration to paſs in the purſuer's name, directed and aſſiſted by their advice. This is certain, that the factory, of the 21ſt September, was a private deed, unknown to any perſon, but the purſuer, and others who were particularly intereſted. Notwithſtanding its arrival in December 1764, the purſuer ſtill acted as ſole adminiſtrator, whilſt many contracted with him upon the faith of his powers of attorney. The titles of the purſuer will not eſcape your Lordſhips notice; he poſſeſſes the eſtate upon a decreet of irritancy, either colluſively obtained to exclude creditors contracting upon the faith of the eſtate, or obtained at leaſt without any regular oppoſition. The point of law in this queſtion is extremely obvious. The purſuer muſt now be bound to implement all the deeds formerly contracted, *factorio nomine*. By his perſonal obligation, he was bound, if exceeding his powers as factor, to make theſe as effectual as poſſible by giving damages. He is now in full poſſeſſion of the eſtate. Suppoſing that his powers of attorney had been ſo limited, as to exclude him from giving leaſes, he is now bound to make good theſe leaſes which he granted, and is barred *perſonali exceptione* from impugning them. With regard to the purſuer's powers of attorney, your Lordſhips can have no doubt that they are of the moſt ample kind that can poſſibly be granted.—The purſuer alledges,

that William Dunbar, his father, meant to confine his powers of adminiſtration ſolely to the borrowing of money and granting ſecurities. The private views which William Dunbar had cannot come under your Lordſhips conſideration; you muſt judge from the import of the letter of attorney itſelf. The powers given *de facto* are to grant leaſes, both of the lands and mines. He was likewiſe veſted with the higher powers of mortgaging and wadſetting. It is impoſſible therefore to refuſe him the powers of an ordinary factor. It is averred, that the factory of the 21ſt September arrived prior to the contracts of leaſe; perhaps it did ſo; but ſtill the purſuer continued to act as ſole adminiſtrator. What concluſion can be drawn from the concealment of this deed, or refuſal of it by the factors, is not very favourable. It would ſeem that it was concealed upon the falſe idea that the deeds done poſterior to it, if found any way inconvenient, might be ſet aſide. Be this as it will, the laſt factory was a private deed, and the declarator of irritancy to inveſt the purſuer with the titles of proprietor, was brought in the end of the year 1767.

The defender ſhall now proceed to ſtate to your Lordſhips the defences which occur againſt the purſuer's reaſons of reduction.

The firſt reaſon which the purſuer alledges is, That the leaſes were granted *a non habente poteſtatem*. Your Lordſhips have been already informed that the purſuer's father, William Dunbar, had granted, at different times, ſeveral diſcrepant factories upon his eſtate. He had granted one to Mr Agnew of Scheuchan, dated 21ſt June 1761, which he refuſed to accept; another factory, dated the 3d June 1762, to David Maxwell of Bardrochwood, and Mr Agnew of Scheuchan, which theſe gentlemen declined as informal. He had granted another factory, dated 30th May 1764, which arrived in Scotland in Auguſt following, in favours of Mr Agnew of Scheuchan, David Maxwell of Cairnſmuir, and William Maxwell his eldeſt ſon, two to make a quorum. It will be proper

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to obſerve upon this laſt factory, that it was never accepted by the factors named in it, or any orders given for regiſtrating it. This appears from the declaration of Mr Agnew of Scheuchan, in the competition concerning the leaſes of the mines. The factory was ſtolen privately into the records of the commiſſary court-books of Wigton, 24th October 1764, by one Mr M'Kinnel, who had formerly been employed as agent by the truſtees. In this ſituation was the eſtate of Machriemore, when the purſuer arrived with his power of attorney. There were no factors who could adminiſtrate the affairs of the family. David Maxwell, when the factory of the 30th May arrived, was upon deathbed, totally incapable of buſineſs; and William Maxwell his ſon, a minor. When the purſuer arrived, the former truſtees conſidered their powers (if they had any) totally ſuperſeded. This likewiſe appears from Mr Agnew's declaration in the above mentioned proceſs. The only factory which remains now to be conſidered is dated the 21ſt September 1768. By this factory, it is alledged, that the purſuer's powers were recalled; but the factors named in it had a different idea of the matter. For the intereſt of the family of Machriemore, it was thought proper to keep it private. And, though never accepted, nor acted under, it was ſecreted by Mr M'Kinnel the agent, and by him privately regiſtered in the ſtewart-books of Kirkcudbright. By the letters of attorney in favours of the purſuer, he was declared to be *a true and lawful attorney irrevocable*. The purſuer came over to Scotland with the ſole view of clearing up the diſordered affairs of his family. Had he thought himſelf ſubjected to the changeableneſs of his father's diſpoſition in the article of factories, he would never have accepted. Had he not been veſted with the higheſt powers, the intention of his journey would have been totally fruſtrated. Beſides, it is agreeable to the rules of law, that a mandate may be granted irrevocably, when, for the advantage of the mandatary, or *in rem ſuum*. William Dun-

Printed ſtate, p. 23.

State, p. 25.

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bar had occaſioned a great confuſion in his own affairs, and involved them almoſt irrecoverably. The purſuer, as next heir of entail, was intimately concerned in every ſtep taken in the management of the eſtate. There is nothing therefore inconſiſtent in the idea of the purſuer's letters of attorney being granted by his father irrevocably.

The ſecond reaſon of reduction, is the miſnomen of the witneſs *Alexander Adair*, who, in the teſting clauſe of the leaſe of Meikle Carſe, is named *John Adair*.

This leaſe your Lordſhips will be informed, is holograph of the granter, who is conſequently accountable for the erroneous deſignation. Though the want of a deſignation cannot be ſupplied; yet, where *conſtat de perſona*, an error may be rectified. But this is not an error in the deſignation, but a ſimple miſnomen, which, if your Lordſhips have any difficulty, can ſtill be ſupplied by the witneſs's oath to the verity of the ſubſcription.

The third reaſon of reduction is, That the commencement of the leaſe of the lands of Meikle Carſe took place when the powers of the conſtituent, under whom the purſuer acted, were at an end, in conſequence of the decreet denuding him, before poſſeſſion could be taken, at Whitſunday 1769. But the ſhort anſwer to this is, That the purſuer was impowered to grant leaſes; he could conſequently point out the terms of their commencement. The eventual and colluſive denuding of William Dunbar alters not the caſe; the purſuer bound his father as conſtituent; he himſelf therefore, as heir, lies under the ſame obligation to implement. Beſides, the purſuer is barred from objecting to theſe obligations, as they were his own acts and deeds.

The fourth reaſon of reduction, That the leaſes were obtained from a young man, unacquainted with the value of the ſubject, at a rent not the one half of what it ought to have given: The fact is, that the defender accepted of the leaſe of Park M'Lurg, upon the particular ſolicitations of the purſuer. He accepted the leaſe with reluctance, as he paid

L. 45

L. 45 Sterling of graſſum at his entry, and L. 5 of additional rent. The former tenant had loſt money by that farm. The defender therefore, when the bargain was compleat, begged to be off; which was refuſed. As for the other farm of Meikle Carſe, the rent is fully adequate to its value, if not more. The purſuer, it is well known, acted always under the particular advice of Mr Agnew of Scheuchan, a man perfectly ſkilled in country-affairs.

Your Lordſhips, from what has been ſaid, will, it is hoped, be of opinion, that this action of reduction is very ill grounded. Fraud and circumvention are by no means libelled. It is only ſuggeſted, that the defender holds the lands at a lower rent than perhaps he might now obtain, were the leaſes to be renewed. The value of land has been every day increaſing for ſome years paſt. It will not be every little inequality of rent which will preſume fraud. But the fact in this caſe is, that the lands are rented equal to any in the neighbourhood. The purſuer was impowered by his letter of attorney to grant leaſes. Though his powers had not been ſo extenſive, he would ſtill have been bound, in the ſituation in which he now ſtands, to implement his obligation. There is no competition now in the field betwixt his leaſes, or thoſe of the former factors. He now oppoſes, as proprietor, what he did acting in the capacity of factor. He is therefore, upon every principle of law, bound to implement to the full extent of the leaſes. Many acts of adminiſtration were performed by him, adminiſtrating *factorio nomine*. Many leaſes were let, and many obligations entered into, whilſt he acted in that capacity. All theſe, in the preciſe predicament with the preſent caſe, wait your Lordſhips judgment as deciſive of their fate. How great the confuſion, and how numerous the law-ſuits, if the defender's leaſes ſhall be reduced. It is therefore humbly hoped, that your Lordſhips will diſmiſs this proceſs as improper, the reaſons of reduction as irrelevant, and give the defender redreſs by awarding full coſts.

In reſpect whereof, &c.

GEORGE CLERK.